No. 89-782

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

FREDERICK SMITH, in his individual and official capacity as Principal of the Bradford Area High School; RICHARD MILLER, in his individual and offical capacity as assistant principal of the Bradford High School; and FREDERICK SHUEY, in his individual and official capacity as Superintendent of the Bradford Area School District,

Petitioners,

vs.

JUDY GROVE SOWERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALLACE J. KNOX
Counsel of Record
SEAN J. MCLAUGHLIN
RICHARD A. LANZILLO
KNOX MCLAUGHLIN GORNALL & SENNETT, P.C.
120 West Tenth Street
Erie, Pennsylvania 16501
(814) 459-2800

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether public school administrators who adopt a practice, custom or policy of active concealment, toleration and facilitation of instances of known or suspected sexual abuse of students by their teachers are entitled to qualified immunity where their conduct results in repeated sexual assaults of students by teachers.

2. Whether the constitutionally protected liberty interest of individuals in freedom from physical abuse and the corresponding duty of government officials not to sanction, encourage or facilitate violations of that interest by their subordinates were clearly established in 1979.

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STATEMENT OF THE CASE

a. Procedural posture.

Judy Grove Sowers ("Respondent" or "Sowers") commenced this action pursuant to 42 U.S.C. Section 1983 (1982) in the United States District Court for the Western District of Pennsylvania, Case No. 88-57, against the Bradford Area School District ("School District"), Frederick Smith, the principal of the Bradford Area High School, Richard Miller, the assistant principal, and Frederick Shuey, the superintendent of the School District.[1]

Pursuant to Fed.R.Civ.Pro. 12(b)(6), the defendants moved to dismiss Respondent's complaint on the ground, *inter alia*, of qualified immunity.[2] The district court denied the motion. *Sowers v. Bradford Area School District*, 694 F.Supp.125, 140 (W.D. Pa. 1988), App. at p. 79. The individual defendants ("Petitioners") appealed the district court's decision with respect to qualified immunity to the United States Court of Appeals for the Third

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[1] The individual defendants were sued in both their individual and official capacities.

[2] The defendants also moved to strike portions of certain paragraphs of the complaint on the grounds that these paragraphs "contain[ed] immaterial, impertinent and scandalous matters . . . " Motion to Dismiss and/or Strike p. 2, App. at p. 29. The district court denied this motion. *Sowers v. Bradford Area School District*, 694 F.Supp.125, 128 (W.D. Pa. 1988), App. at pp. 46-47. Only the issue of qualified immunity was immediately appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

Circuit, which affirmed by judgment order, without opinion, on January 31, 1989. Thereafter, Petitioners filed a Petition for Writ of Certiorari in the United States Supreme Court. On April 3, 1989, the Supreme Court granted certiorari in this case and remanded it to the Court of Appeals for "further consideration" in light of its recent decision in *DeShaney v. Winnebago Department of Social Services*, 489 U.S. ___, 109 S.Ct. 998, 57 L.Ed.2d 4218 (1989). App. at p. 87. On remand, the Court of Appeals again affirmed the judgment of the district court. App. at p. 1.

b. Statement of Facts.

In accordance with Fed.R.Civ.Pro. 12(b)(6), the facts material to the judgment of the district court and the Court of Appeals were derived primarily from the complaint. App. at pp. 73-76. In the district court, Petitioners appended to their motion to dismiss four of several hundred pages of previous deposition testimony of Respondent in three related cases.[3] However, the district court determined that the materials submitted by Petitioners were irrelevant to a determination of their motion to dismiss. App. at pp. 57-58.

The gravamen of Respondent's complaint was that the School District, acting through Petitioners, adopted a

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[3] Accordingly, Respondent filed a motion in the district court requesting that Petitioners' motion to dismiss be treated as one for summary judgment and disposed of as provided in Rule 56. The district court denied this motion.

pernicious practice, custom or policy of reckless indifference to and active concealment of instances of known or suspected sexual abuse of students by teachers; that this practice, custom or policy created a climate which facilitated and encouraged sexual abuse of students by teachers in general; and that this practice, custom or policy specifically resulted in a sexual assault upon Respondent by the Bradford Area High School band director, Edward Wright ("Wright"). Complaint at ¶¶23-26, 30-31, App. at pp. 13-18, 20.

Respondent's complaint set forth a number of incidents of abuse of students by teachers and Respondents' responses thereto in support of her allegation that an unconstitutional practice, custom or policy existed in the School District. The first incident of abuse described in the complaint occurred in late 1977 or early 1978 when a social studies teacher, Richard DeMarte, sexually accosted Theresa Rogers, a student at the Bradford Area High School. Theresa Rogers immediately reported this incident to Mr. Miller and Dr. Smith, who warned her that it was going to be her word against Mr. DeMarte's and that she should not go home and tell her parents about the assault. Complaint at ¶26(a), App. at p. 14.[4]

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[4] The details of this incident as described in Theresa Rogers' deposition are set forth at page 1100 of the district court's opinion in the related case of *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088, 1100 (W.D.Pa. 1987), *aff'd*, 856 F.2d 594 (3d Cir. 1988), *vacated sub nom. Smith v. Stoneking*, ___ U.S. ___, 109 S.Ct. 1333 (1989), *aff'd on remand*, 882 F.2d 720 (3d Cir. 1989).

In or about 1978, and periodically thereafter, Petitioners received complaints of sexually abusive language and improper sexual advances by a shop teacher, George Brady. Again, no disciplinary action was taken against Mr. Brady and the administrative response to his actions was to place a sign on Brady's shop door prohibiting students from congregating there. Complaint at ¶26(b), App. at pp. 14-15.

Wright assaulted Respondent on June 16, 1979.[5] After Respondent reported the incident to the school administration, Dr. Smith required Respondent to appear before the assembled high school band for the purpose of issuing a public apology for having accused Wright of the sexual assault. Dr. Smith told Respondent that a public apology was a condition to her continued participation in the band. At the band meeting, Dr. Smith opened the floor to questions from Respondent's fellow students, but Respondent did not issue an apology and left the band room overwhelmed and distraught from the experience. Complaint at ¶¶17-18, App. at p. 12; Complaint at ¶26(c), App. at p. 15.

On or about January 12, 1981, Petitioners Smith and Miller were informed by another female student of the Bradford High School that Richard DeMarte had kissed

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[5] Whether Judy Sowers consumed alcoholic beverages at her sister's wedding prior to Wright's assault upon her has no relevance to Petitioners' claim to qualified immunity in this case. *See* Petition for Writ of Certiorari at pp. 9-10.

her on the neck several times in a classroom. No disciplinary action was taken against DeMarte and the administration's response to the incident was to remove the student from DeMarte's class and issue to him a "no one-on-one" directive. Complaint at ¶26(d), App. at p. 15.

On or about March 10, 1981, another female student of the Bradford High School reported to Smith and Miller that Richard DeMarte had blindfolded her in a classroom, ostensibly to demonstrate the sense of touch, and she observed him on his hands and knees looking up her dress. No disciplinary action was taken against DeMarte, and Smith actively intimidated the student from pursuing further action by stating that it was "DeMarte's word against hers" and "Mr. Miller and he would have to judge from that." Another "no one-on-one" directive was issued to DeMarte. Complaint at ¶26(e), App. at pp. 15-16.

In or about March of 1982, two female students complained to the Petitioners that Mr. Brady had written sexually suggestive notes and further had asked female students to come into a shop room alone after school. No disciplinary action was taken against Brady. Complaint at ¶26(f), App. at p. 16.

On or about November 23, 1982, yet another female student at the High School complained to Smith and Miller that Richard DeMarte had touched her inappropriately and was attempting to develop a romantic relationship. No disciplinary action was taken against DeMarte. Complaint at ¶26(g), App. at p. 16.

Commencing in or about June of 1984 and continuing approximately through November of 1984, the Petitioners

were advised by numerous sources, including the parents of a female basketball player in the high school, that her male coach, Alex Nuzzo, was attempting to develop a romantic relationship with her. Despite numerous complaints, no disciplinary action was taken and Nuzzo was simply issued a written "no one-on-one" directive by Smith with the knowledge and consent of Miller, Shuey and the School Board. Complaint at ¶26(h), App. at pp. 16-17.

In or about late September or early October of 1984, a female band member informed a guidance counselor that Wright had attempted to sexually molest her in a vehicle. In addition, this student notified the counselor that Wright was presently molesting another student and had molested another student prior to her graduation.[6] This information was relayed to Dr. Smith and ultimately Mr. Shuey. Complaint at ¶26(i), App. at p. 17. On or about December 15, 1984, Dr. Smith met with Mr. Wright and issued another no one-on-one directive, but informed Wright that "no one had accused him of any wrongdoing." Complaint at ¶26(j), App. at p. 17.

In or about October of 1985, Petitioners were informed that Richard DeMarte had attempted to sexually assault a former Bradford High School student, while attending a homecoming celebration. No disciplinary

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[6] This latter student was Kathleen Stoneking, the plaintiff in the related case of *Stoneking v. Bradford Area School District*. The details of her ordeal are set forth in the district court opinion in that case. See *Stoneking v. Bradford Area School District*, 667 F.Supp. 1088 (W.D.Pa. 1987).

action was taken against DeMarte. Complaint at ¶26(k), App. at p. 17.

In or about March of 1986, three female Bradford High School students complained to Petitioners that the girls swimming coach had made improper sexual comments. No disciplinary action was taken against the coach. Complaint at ¶26(l), App. at pp. 17-18.

In addition to this history of condoned abuse in the high school, Respondent's complaint also described Wright's course of misconduct and its relationship to Petitioners. Prior to his employment in the School District, Wright had attempted to sexually molest and harass various female students while employed as the band director in the Jasper School District. Complaint at ¶20, App. at p. 13. During his tenure in the Bradford School District, Wright sexually abused or harassed other female students in the district, both prior and subsequent to assaulting Respondent. Complaint at ¶21, App. at p. 13. Petitioners were on actual or constructive notice that Wright posed a significant threat to female students at the Bradford Area High School in general and Respondent in particular prior and subsequent to June 16, 1979. Complaint at ¶22, App. at p. 13.

Wright finally resigned as the band director of the School District in March 1986. However, his resignation was prompted not by any action of the School District or Petitioners. Instead, his resignation came only after public disclosure of his abuse by a private psychologist. Complaint at ¶26(m), App. at p. 18.

Count I of Respondent's complaint alleged that Petitioners' conduct created a climate wherein child abusers,

such as Wright, could prey upon female students with impunity and that this conduct was a proximate cause of a deprivation of Respondent's constitutionally protected right of freedom from sexual abuse. Complaint at ¶¶30-31, App. at p. 20.

Count II alleged that Petitioners conspired to conceal from the public instances of known or suspected sexual abuse of students by various teachers. The alleged overt acts in furtherance of the conspiracy included, *inter alia*, Smith's keeping of a personal, secret file in his desk drawer at home memorializing many of the complaints against teachers. The alleged proximate results of the conspiracy were the same as those under Count I. Complaint at ¶¶33-39, App. at pp. 21-22.

ARGUMENT

a. Summary of Argument

In *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989) ("*Stoneking II*"), the United States Court of Appeals for the Third Circuit found it unnecessary to determine whether Petitioners had a duty to protect Kathleen Stoneking from sexual abuse by Edward Wright because the complaint and record in that case supported an alternative ground for denying Petitioners' motion for summary judgment based on qualified immunity. The Court of Appeals held that a reasonable jury could conclude from the evidence adduced in the district court that Petitioners adopted and maintained practices, customs or policies that facilitated sexual abuse of students by teachers in general, and that a causal link existed between

Petitioners' own actions and the repeated sexual assaults against Stoneking by Wright. In this action, the Court of Appeals correctly concluded the Respondent's complaint supports the denial of qualified immunity to Petitioners based on the same theory of liability upon which the court rested its decision in *Stoneking II*.

This theory of liability is independent and distinct from the principles confirmed by this Court in *DeShaney* and from the "special relationship" analysis utilized by the Court of Appeals in *Stoneking I*. In *Stoneking II*, the Court of Appeals determined that this alternative theory of liability was clearly established and recognized in the decisions of this Court, its own decisions, and the decisions of various other federal courts of appeals prior to the period of time during which Petitioners committed the acts complained of in Respondent's complaint. Even Judge Stapleton agreed in his dissenting opinion that Stoneking "allege[d] an alternative and distinct theory of liability that is not rejected in *DeShaney*."[7] *Stoneking II*, 882 F.2d at 731 (Stapleton, Judge, concurring in part and dissenting in part).

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[7] In his dissent, Judge Stapleton disagreed with the majority regarding whether the record contained sufficient evidence to defeat Petitioners' motion for summary judgment with respect to this alternative theory of liability. In their petition, Petitioners assert that the "Court of Appeals went on to, in effect, decide a motion for summary judgment on the merits [of the alternative theory of liability] that Smith and Miller were never permitted to argue." Petition for Writ of Certiorari at p. 13, n.3. This assertion is simply untrue. On remand to the

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The Court of Appeals also noted that the situation of school children, compelled by state law to attend school, "*may* not be dissimilar" to other custodial circumstances that give rise to a governmental duty of protection. *Stoneking II*, 882 F.2d at 723-24 (emphasis supplied). Petitioners contend that this statement constitutes a "*sub silentio* holding" reaffirming that "they had a duty to protect school students from harm." Petition for Writ of Certiorari at p. 11. However, the Court of Appeals specifically declined "to rest [its] decision again on an affirmative duty to protect . . . students in this situation . . . " 882 F.2d at 724. Thus, the "duty to protect" or "special relationship" theory of liability, which prompted this Court's remand of the case for further consideration in light of *DeShaney*, no longer provides the basis for the holding of the Court of Appeals in *Stoneking II* or the instant case. Any reference in *Stoneking II* to this theory of liability is pure dicta and does not warrant review by the United States Supreme Court.

The remainder of Petitioners' contentions are factual arguments, which similarly do not justify consideration

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Court of Appeals, the issue of Petitioners' facilitation and tacit encouragement of abuse was thoroughly briefed by counsel for both parties. In *Stoneking II*, on remand, Petitioners submitted an additional "Supplemental Appendix" in direct response to the alternative theory of liability argued by Respondent in her brief. Petitioners' statement that "the Court of Appeals majority issued its ruling *sua sponte*" is contradicted by Petitioners' own submissions to the Court of Appeals.

by this Court. The Court of Appeals correctly concluded that the allegations of the complaint in this case support all of the factual findings necessary to sustain personal liability against Petitioners for the constitutional deprivation sustained by Respondent.

b. The statements made by the Court of Appeals in *dicta* do not merit review by the Supreme Court.

The Court of Appeals did not base its decision upon a "duty to protect" theory of liability. Petitioners concede this, but nevertheless argue that "[t]he failure of the Court of Appeals to expressly rule on the *DeShaney* issue has the practical effect of denying Smith, Miller and Shuey's claim of qualified immunity with respect to the 'duty to protect' theory of liability." Petition for Writ of Certiorari at p. 12. They further contend that "the trial court *may* choose to charge the jury that Smith, Miller and Shuey had a duty under the Fourteenth Amendment to protect Stoneking from the harm that allegedly befell her . . . " *Id.*

Petitioners' statements regarding the "practical effect" of *Stoneking II* is plainly incorrect given the holding of the Court of Appeals in that case with respect to Shuey:

> [W]e must conclude, in light of our precedent, that Stoneking's claims against Shuey amount to mere "inaction and insensitivity" on his part. See *[Commonwealth v.] Porter*, 659 F.2d [306,] 337 [(3d Cir. 1981) (in banc), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982)]. We cannot discern from the record any affirmative acts by Shuey on which Stoneking can base a claim of toleration, condonation or

> encouragement of sexual harassment by teachers which occurred in one of the various schools within his district.
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> * * *
>
> [W]e will vacate the district court's order denying the motion for qualified immunity as to Shuey in his individual capacity, and remand with directions that his motion be granted.

Stoneking II, 882 F.2d at 731.

Petitioners' argument is also premature. They are complaining about a possible action that the district court "may" take with respect to an issue that the Court of Appeals found unnecessary to address. The Supreme Court has acknowledged on various occasions that it normally will not review issues not passed on by the Court of Appeals. *City of Canton, Ohio v. Harris*, 489 U.S. ___, 109 S.Ct. 1197, 1203, n.5 (1989); *Bowen v. American Hospital Association*, 476 U.S. 610, 625, n.11 (1986) (per Justice Stevens) (*quoting Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842 (1984)). The logic underlying this policy becomes even more compelling where the judgment of the Court of Appeals rests upon a well-established theory of liability such as that relied upon by the Court of Appeals in this case.

c. The theory of liability upon which the Court of Appeals based its judgment in *Stoneking II* is unaffected by this Court's decision in *DeShaney v. Winnebago County Department Of Social Services*.

DeShaney arose out of a State's failure to intervene and protect a small boy, Joshua DeShaney, who had been beaten and permanently injured by his father, with whom

he had lived. Joshua DeShaney's guardian ad litem commenced an action in federal court pursuant to 42 U.S.C. Section 1983 against certain social workers and other local officials who had received complaints that Joshua was being abused by his father, but who nonetheless had not acted to remove the boy from his father's custody. The plaintiff claimed that the defendants' failure to act had deprived Joshua DeShaney of his liberty in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court rejected this argument, holding that "a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 109 S.Ct. at 1004.

As the Court of Appeals noted, the "principal distinction" between *DeShaney* and *Stoneking II* is the status of the abuser and the abuser's relationship to the government body. *Stoneking II*, 882 F.2d at 724. In *DeShaney*, "the State [had] played no part in creating" the danger to Joshua DeShaney. 109 S.Ct. at 1006. No link existed between the defendants and the abuse of Joshua. Joshua had suffered his tragic fate at the hands of his father, "who was in no sense a state actor." *Id.* (footnote omitted). However, in the instant case, the abuser was a state actor whose assaults upon Respondent were facilitated by the conduct of his superiors and his status as director of the Bradford Area High School band.

The second critical distinction between *DeShaney* and the instant case is the nature of the conduct of the individual defendants in each case. In *DeShaney*, the defendants were guilty only of passive inaction in the face of private violence. In contrast, the complaint supports that

Petitioners actively concealed reports of abuse perpetuated by their subordinates upon students and actively intimidated students who did attempt to complain. As the Court of Appeals observed, "[n]othing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725.

d. **Petitioners' contention that the holding of the Court of Appeals creates a "new theory of personal liability for school officials" is incorrect and does not merit Supreme Court review.**

Petitioners argue that the Court of Appeals created "a new theory of personal liability for school officials in their individual capacities." Petition for Writ of Certiorari at pp. 11, 24-25. This contention is inconsistent with this Court's analysis in *Kentucky v. Graham*, 473 U.S. 159 (1985). In *Graham*, the Court explained that a "personal-capacity suit," in contrast to an "official-capacity suit," "seeks to impose personal liability upon a government official for *actions he takes* under color of state law." 473 U.S. at 165 (emphasis added) (citations omitted). The theory of personal liability urged by Respondent and adopted by the Court of Appeals in *Stoneking II* is predicated upon the acts of Petitioners that facilitated, condoned and encouraged the abuse of students by teachers under Petitioners' supervisory authority. As the Court of Appeals noted, Petitioners "were incontestably acting under color of state law" with respect to the supervisory conduct at issue. *Stoneking II*, 882 F.2d at 724.

"On the merits, to establish *personal* liability in a §1983 action, it is enough to show that the official, acting

under color of state law, caused the deprivation of a federal right." *Graham*, 473 U.S. at 166 (emphasis in original, citations omitted). The Court of Appeals correctly concluded that Respondent's allegations in this case are sufficient to support a finding that the acts of Petitioners caused the deprivation of Respondent's constitutionally protected rights. Although Petitioners disagree with this conclusion, such factual disputes do not warrant review by the Supreme Court.

Once it is established that the complaint supports a *prima facie* cause of action against government officials in their personal or individual capacities, the officials may attempt to raise various defenses, including qualified immunity, which Petitioners have raised in the instant case. *Graham*, 473 U.S. at 166-67. Under the defense of qualified immunity, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635 (1987). Consistent with this principle, the United States Court of Appeals for the Third Circuit requires "some but not precise correspondence" with applicable precedents, and demands that "officials apply well-developed legal principles." *People of Three Mile Island v. Nuclear Regulatory Comm.*, 747 F.2d 139, 144 (3d Cir. 1984).

In *Stoneking II*, the Court of Appeals correctly concluded that both the constitutionally protected rights of

Stoneking and the corresponding duties of Petitioners were clearly established prior to and during the period of time Petitioners committed the acts complained of in Stoneking's complaint. The liberty interest in freedom from state intrusions into bodily security is as old as the Constitution itself. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). The applicability of this interest to public school children has been recognized at least since 1977, when this Court held in *Ingraham v. Wright*, that "corporal punishment in the public schools implicates a constitutionally protected liberty interest." 430 U.S. 651, 672 (1977). As the Court of Appeals observed, the individual right to be free from more egregious intrusions upon personal security, such as sexual molestation, predates this Court's decision in *Ingraham*:

> Since a teacher's sexual molestation of a student could not possibly be deemed an acceptable practice, as some view teacher-inflicted corporal punishment, a student's right to be free from such molestation may be viewed as clearly established even before *Ingraham*.

Stoneking II, 882 F.2d at 727 (citing *Rochin v. California*, 342 U.S. 165 (1952) (substantive due process violation occurs where conduct "shocks the conscious")).

Similarly, in 1976, this Court recognized that government officials charged with supervisory authority could be held liable under Section 1983 where an "affirmative link" exists between the supervisors' own actions and the misconduct of their subordinates. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). The Court of Appeals found that this basis for liability was well-established at the time Respondent was assaulted by Wright. Specifically, the

Court of Appeals held that "by at least 1981 . . . it was clearly established law that [supervisory] officials may not with impunity maintain a custom, practice or usage that communicated condonation or authorization of assaultive behavior." *Stoneking II*, 882 F.2d at 730. The Court of Appeals based this conclusion upon multiple federal cases, including this Court's decision in *Rizzo v. Goode* and two of its own cases decided in 1981. *Stoneking II*, 882 F.2d at 729-30 (citing *Commonwealth v. Porter*, 659 F.2d 306, 309 (3d Cir. 1981) (en banc), *cert. denied*, 458 U.S. 1121 (1982); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982)).

The Court of Appeals noted that its "holdings [in *Porter* and *Black*] were consistent with those reached earlier by other federal courts of appeals. *Id.* at 730 (citing *McClelland v. Facteau*, 610 F.2d 693, 697-98 (10th Cir. 1979) (police chiefs may be held liable for failure to correct misconduct of which they have notice); *Sims v. Adams*, 537 F.2d 829, 832 (5th Cir. 1976) (complaint stated cause of action against mayor and chief of police for failure to control police officer's propensity for violence); *Turpin v. Mailet*, 579 F.2d 152, 167-68 (2d Cir. 1978) (en banc) (city could be liable under the Fourteenth Amendment for encouraging animosity among police officers against plaintiff which led them to believe that they could violate his civil rights with impunity), *vacated in light of Monell*, 439 U.S. 974 (1978), *reinstated*, 591 F.2d 426 (2d Cir. 1979) (per curiam) (case reinstated on same theory but under §1983 in light of *Monell*); judgment for plaintiff reversed, *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir.) (plaintiff failed to prove official policy where "there was no evidence of a

prior pattern or practice of harassment"), *cert. denied*, 449 U.S. 1016 (1980)).

Petitioners argue that the court's holding in *Stoneking II* represents an expansion of the theory of liability reconfirmed by this Court in *City of Canton v. Harris*, 489 U.S. ___, 109 S.Ct. 1197 (1989). Although the Court of Appeals noted that its analysis was consistent with *City of Canton*, its denial of qualified immunity to Petitioners was based exclusively on the state of the law as it existed when Stoneking and Respondent were being abused by Wright. The Court of Appeals merely recognized that Stoneking's theory of liability against the School District and Petitioners in their official capacities will not be determined according to the law as it existed in 1981, but as it exists today, including the principles reconfirmed in *City of Canton*. *See also Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir.) (liability against police chief and mayor for unauthorized actions of police officers forcing entry into bar and beating patrons based on the police officials' constructive knowledge of custom and deficient policies in recruitment and training), *cert. denied sub nom., Everett v. Bordanaro*, ___ U.S. ___, 110 S.Ct. 75 (1989). The Court of Appeals properly concluded that its decision in *Stoneking II* dictates the outcome of Petitioners' appeal in this case.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny the Petition for writ of Certiorari.

Respectfully submitted,

KNOX MCLAUGHLIN GORNALL & SENNETT, P.C.

WALLACE J. KNOX
SEAN J. MCLAUGHLIN
RICHARD A. LANZILLO
Attorneys for Respondent, Judy Grove Sowers
120 West Tenth Street
Erie, Pennsylvania 16501
(814) 459-2800